Filed 2/11/13 P.v. Martinez CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE GARCIA MARTINEZ, Defendant and Appellant.	A129840 (Contra Costa County Super. Ct. No. 50809004)

BY THE COURT:

It is ordered that the opinion filed on January 11, 2013, be modified as follows:

In the last paragraph of page 18, first sentence, insert this footnote after the word "doctrine":

The natural and probable consequences doctrine is applied in cases involving the liability of conspirators for substantive crimes committed in the course of a conspiracy and the liability of aiders and abettors. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 260-261, and cases cited therein.)

In the paragraph ending at the top of page 19, at the end of the paragraph, change the bracketed citation to: (*People v. Prettyman, supra,* 14 Cal.4th at p. 261.)

Following the first full paragraph on page 19 that ends with citation to *Canizalez,* insert this additional paragraph:

Moreover, "the natural and probable consequences doctrine operates independently of the second degree felony-murder rule. (*People v. Culuko* (2000) 78 Cal.App.4th 307, 322.) The natural and probable consequences doctrine does not merge

all assaults into the felony-murder rule. Rather, it is a theory of liability for murder that applies when the assault has the foreseeable result of death. For aider and abettor liability, it is the intention to further the acts of another that creates criminal liability and not the felony-murder rule. (*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1052-1054.)" (*People v. Karapetyan* (2006) 140 Cal.App.4th 1172, 1178.)

On page 21, after the citation to *Medina* in the second line, insert the following sentence:

The trial court instructed the jury on the prosecutor's burden to prove every element of every offense beyond a reasonable doubt and natural and probable consequences, and the prosecutor argued natural and probable consequences to the jury.

This modification does not effect a change in the judgment. The petition for rehearing is denied.

Dated: _____ _____

Haerle, Acting P.J.

Filed 1/11/13 P. v. Martinez CA1/2 (unmodified version)

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I. INTRODUCTION

This case arises out of gang violence in Richmond and San Pablo that resulted in five deaths. Appellant Jose Garcia Martinez appeals from the judgment following a jury trial in which he was convicted of one count of second degree murder and of conspiracy to commit the assault that resulted in the victim's death. Appellant contends the trial court erroneously instructed the jury on invalid theories of second degree felony-murder, thereby depriving him of due process and necessitating reversal. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 5, 2008, the Contra Costa County District Attorney filed an indictment charging appellant, Frank R., and Fernando Jesus Garcia with seven felonies: (1) murder of Jose Mendoza-Lopez on January 26, 2008, with gang enhancement and gun-discharging allegations (Pen. Code, §§ 187, 186.22, subd. (b)(1), 12022.53, subds. (b), (c), (d), (e)(1))[1] (count 1); (2) conspiracy to commit murder and aggravated assault (§§

[1] All further unspecified statutory references are to the Penal Code.

182, subd. (a)(1), 187, 245, subd. (a)(1)) with a gang allegation (§ 186.22, subd. (b)(1)); the charge named 10 co-conspirators and alleged 19 overt acts committed from December 22, 2007, through April 26, 2008 (count 2); (3) engaging in a criminal street gang conspiracy (§ 182.5) (count 3); (4) murder of Antonio Centron on December 22, 2007 with a gang allegation (§§ 187, 186.22, subd. (b)(1)) (count 4); (5) murder of Luis Perez on February 16, 2008, with a gang allegation (§§ 187, 186.22, subd. (b)(1)) (count 5); (6) murder of Lisa Thayer on February 27, 2008, with a gang allegation (§§ 187, 186.22, subd. (b)(1)) (count 6);and (7) murder of Rico McIntosh on April 26, 2008, with a gang allegation (§§ 187, 186.22, subd. (b)(1)) (count 7).

Only appellant stood trial. Co-indictee Frank R. pleaded guilty to being an accessory in return for his testimony against appellant. Co-indictee Garcia fled immediately after the killing of Mendoza-Lopez and remained at large. On June 7, 2010, the court granted the prosecutor's motion to amend the indictment to add a strike prior allegation (§§ 667, subd. (a)(1), 1170.12) against appellant based on a prior conviction for assault by means of force likely to produce great bodily injury with a gang enhancement finding.

At trial, the prosecution pursued a theory that all seven counts were the result of Sureño gang members conspiring to kill Norteños. The jury convicted appellant of second degree murder in the shooting death of Mendoza-Lopez at a party on January 26, 2008. The jury also convicted appellant of conspiracy and found true two overt acts relating to events on that date: appellant attended a party with two other gang members, and appellant alerted others that the victim was wearing red. The jury did not return a finding on the two other overt acts related to the January 26, 2008, party: that appellant and three other gang members approached the victim and shouted the name of their gang, and that appellant shot the victim. The jury returned true findings that the murder was committed for the benefit of the gang and that a principal intentionally discharged a firearm, causing Mendoza-Lopez's death. The jury returned a not true finding that

appellant discharged the firearm. The jury also convicted appellant of being a member of a criminal street gang.[2]

Prosecution Case

Diana Salazar knew the victim, Jose Mendoza-Lopez, and his family. She testified that he was not involved with street gangs. On Saturday, January 26, 2008, a group of friends and acquaintances including Salazar, the victim, Mayra Lainez, Juan Ayala, Luis Anaya, Noel Castro, Maria Vargas, and Francisco celebrated Ayala's birthday at his house. None of them was a member of a gang. Mendoza-Lopez was wearing shoes and a hat that were red or partially red, according to several witnesses.

Eight of them drove in two cars to a party at the San Pablo apartment of their friends, Paco and Francisco. Some went inside, while Salazar, the victim, Lainez, Castro, and Anaya stayed outside. Lainez testified that she stayed outside because the presence of several Hispanic men who looked like gang members, dressed in blue and wearing hoodies and baggy jeans, made her feel uncomfortable. Blue was the Sureños' color. Anaya testified that he stayed outside because Noel was smoking.

Lainez testified that, after being outside with the victim and Anaya for about three to five minutes, a man walked toward them with a gun. Lainez had seen the man outside when they first arrived. He was with Ingrid Martinez, whom Lainez knew and was wearing a blue and white striped shirt. When he approached them, however, he was wearing a hoodie and a beanie. Martinez tried to stop him, pulling on him and telling him no. The man pulled a gun from the front center pocket of his hoodie and shot Mendoza-Lopez four to five times, then said, "RST on me," in good English. Lainez was standing next to the victim and was within 11 feet of the gunman. She got a good look at the gunman's face; he had no tattoos.

[2] The jury acquitted appellant of the other four murders alleged in counts 4 through 7 and made no findings on the overt acts alleged as to counts 4 through 7, i.e., acts one through three and eight through 18. Therefore, our statement of the evidence adduced at trial will focus on that pertaining to the incident involving Mendoza-Lopez on January 26, 2008.

Anaya testified that he saw six people come out of the apartment toward them. They said, "Southside RSTs," and then one pulled a gun from his black hooded sweater and started shooting. Mendoza-Lopez had said that they were going to cause problems. Anaya was on Mendoza-Lopez's left, about 8 to 10 feet from the shooter, and Castro was on his right. The shooter was short, around 5 feet 4 inches or 5 feet 5 inches. Fernando Garcia (Danger) was around 5 feet 6 inches. Garcia and appellant were next to each other, both wearing sweaters, and they generally resembled each other. Anaya was not sure who fired the gun. He was nervous and did not want to testify because he knew of someone, a long time ago, who testified and was killed two weeks later. Anaya saw Mendoza-Lopez get shot and fall down. Anaya ran inside the apartment after the third shot. When Anaya went back outside, the shooter's friends started hitting him. Anaya asked "why had you done that because we were not gang members . . . ." They did not respond; they just hit him.

Salazar testified that she had just taken half a step into the apartment when she heard three or four gunshots. She turned and saw Mendoza-Lopez falling. Vargas ran out of the apartment and argued with the shooter. Salazar did not see the shooting, but she thought he was the shooter because of his gestures and because he said "RST on mine" and that Mendoza-Lopez was wearing the wrong color, which he said in English. When Vargas asked him "why he had done what he did, he said that he was wearing the wrong color on the wrong block and that it was RST on his. And he made a gesture, like, covering the gun, put the hoody [sic] on, turned around and ran off." He also said, "I don't mess with girls."

Salazar understood the man clearly. He was speaking in English, and she spoke English and Spanish. She did not recall Spanish being spoken. Salazar did not see a gun in the man's hand, just a gesture to indicate that he had hidden it in his pants. He was 5 feet 9 inches, light-skinned, had short hair, and was in his early 20's. She thought he was the shooter because he was standing by the door.

Salazar then saw three men kicking her friend Anaya on the ground. One of them was a bit heavy with a lot of long facial hair. When Salazar said, "stop," he looked up. He was darker skinned, older looking, bald on top with a long goatee.

Salazar checked to see if Mendoza-Lopez was breathing. Mendoza-Lopez made a gesture, then put his head down and stopped moving. Salazar then called 911.

Appellant's friend Ingrid Martinez testified about the shooting. She used to hang out with Sureño gang members including appellant (Cobra), Fernando Garcia (Danger), and Victor Cervantes (Creeper). Appellant claimed "SSL," Southside Locos. Appellant spoke Spanish and only some words in English; Martinez had a hard time understanding him.

On January 26, Martinez was with friends Ariana and Carla at an upstairs apartment party. Cobra, Danger, and Creeper were there. Ariana and Cobra came upstairs, and Cobra told the other men that someone was wearing red. Everyone went downstairs where Cobra, Danger, and Creeper claimed their Sureño gangs. Mendoza-Lopez, who was downstairs with Ayala and Castro outside a downstairs apartment, told Danger, "I need to talk to you." Martinez tried to tell Cobra and Danger that they were not Norteños, they were nothing, but they did not listen to her. She was afraid something would happen.

Danger said, "okay." And then "they shot." Just before the shooting, Martinez heard "RST on me" or "RST on mine" in English. Martinez saw Cobra shoot Mendoza-Lopez and heard three gunshots. She did not see Danger with a gun.

After the shooting, everyone ran. Martinez went to Danger's house with Ariana and Carla, where she stayed the night. Her mother called in the morning and told her the police were at her house. Martinez called Cobra (appellant), told him the police were at her house, and asked, "why did he do that in front of all that people and putting me into this." Appellant said he was sorry but not to say anything. Appellant did not admit the shooting.

Martinez gave a statement to the police. She was scared and trying not to snitch. She was also nervous because of threats from appellant's brother. She then went to

Mexico for a year, came back, and then moved out of state. Since then, she has not hung out with gang members. She was certain that appellant shot Mendoza-Lopez.

Frank R. testified that he was at the upstairs party on January 26, 2008, with appellant and the others. He had known appellant since 2006. He always spoke to appellant in Spanish since appellant could only speak a few words of English. After about 45 minutes, he left that party shortly before 10:00 p.m. with a couple of friends to go to another one nearby. He had been at the other party for about half an hour when he learned that shots had been fired at the first party. He and the other two friends returned to the apartment and saw that the police had arrived.

Frank R. went to Danger's house. Appellant and others were there. Appellant had a gun in his waistband. Appellant told Cervantes that he killed the victim because he was disrespecting him. Appellant also said the victim was wearing red. When Frank R. asked what happened, appellant said he "fired some shots to this guy." Appellant looked like he was about to laugh, but he also looked worried. Frank R. left Danger's house after about an hour.

The next day, appellant called Frank R. and asked for a ride. Appellant told him the police had picked up Martinez and that he told her that if she said something, she would pay for it.

Frank R. was arrested in 2008 and charged along with appellant for five homicides and two counts of conspiracy. In return for testifying, he pled guilty in juvenile court for being an accessory after the fact. He entered witness protection; the District Attorney paid for his apartment and some living expenses. He testified under a grant of immunity.

Victor Cervantes (Creeper) testified that, on January 26, he and Frank R. and others went to a party at an apartment complex. There, they hung out with appellant, Danger, Stranger (Danger's older brother), Martinez, and a couple of others. They had not been there before because it was Norteño turf. The party was "weird" because ML's (Mexican Locos), VFL's (Varrio Frontero Locos), and RST's (Richmond Sur Trece) all hung out together. People were drinking and dancing.

After about 35 to 45 minutes, Frank R. and two others left to go to another party. Cervantes and others stayed. Appellant came running upstairs as if there were something exciting and said in Spanish "that there were some busters downstairs." Appellant, Danger, Stranger, and someone else ran downstairs. Cervantes walked downstairs and heard Danger arguing with Mendoza-Lopez, saying he had told him not to wear red in Richmond. Then Cervantes heard three gunshots. He heard Danger say in English, "I already told you about wearing all that red in Richmond." Cervantes did not recall anyone say "RST."

Cervantes testified that he saw Danger and appellant facing Mendoza-Lopez and arguing with him. Both Danger and appellant were wearing black hoodies and blue jeans. Danger was on the right-hand side; appellant was on the left. Cervantes could not see who had the gun when he heard the gunshots. He testified that the person on the left, i.e., appellant, had the gun. He admitted that he might have told police the positions were reversed, i.e., that Danger was on the left and appellant on the right.

Danger told Cervantes that if he said anything, they would kill him. Cervantes opened his closet door and an AK-47 fell out. Cervantes said he did not see anything. Frank R. told Cervantes that he thought the shooter had a tattoo over his right eyebrow, which would have been Danger.

Cervantes agreed to testify against appellant in return for a plea bargain in a 2007 case involving assault with a deadly weapon. He was promised no prison time if he pled to a strike felony and accepted a suspended six-year prison term. After this, he went into witness protection and had received just under $20,000 from the District Attorney's office. He testified after being granted immunity.

On January 27, Mayra Lainez was interviewed by police and shown a photographic lineup. She identified appellant as the shooter, but did not remember the faces of the others who were with him. Lainez told police she had known Mendoza-Lopez for two years and did not know him to be a gang member or to have friends who were gang members. Lainez initially described the shooter to police as being 5 feet 10

inches, but appellant is much shorter than that.[3] Lainez had assumed that the shooter was Ingrid Martinez's boyfriend because Martinez was with him and they were hugging each other when Lainez first arrived at the party.

At trial, on direct examination, Lainez stated that she was sure appellant was the shooter. But after being cross-examined on the height estimate she gave police, and seeing that appellant was significantly shorter than her estimate, she testified that she was no longer positive that appellant was the shooter.

On January 28, Officer Bradley Lindblom conducted more photographic lineups. Maria Vargas did not identify anyone. Diana Salazar identified photo number six (appellant) as the shooter; she was positive. She also identified Garcia's photo as one of the people with the shooter. She did not identify Cervantes' or Frank R.'s photos. Neither Ayala nor Anaya identified anyone.

Anaya at first testified that he could not see the shooter's face. Then he identified appellant as the shooter. He did not identify appellant to the police because he was afraid something would happen to his family. After initially identifying appellant, Anaya said, "it looks like him," but he was not sure. Anaya explained that both appellant and Danger were wearing sweaters and "I really don't know if he shot or the other one."

Detective Robert Pamplona and Detective Scott Cook of the San Pablo Police Department interviewed Ingrid Martinez on January 27. She seemed scared. She said she had been at a party with Cobra (appellant), Danger (Garcia), Creeper (Cervantes), Duende (Frank R.), Ariana, and Carla at an upstairs apartment at the complex where the shooting occurred. Martinez said the men she was with were Sureño gang members and they were going downstairs to confront someone who was wearing red, the color of the rival Norteño gang. She said Danger was affiliated with RST, and appellant was associated with SSL. Martinez said that "gang names were all called out by all of her associate friends. And she said then Cobra shot the guy a couple of times." Pamplona testified that Martinez immediately stopped and said, "I didn't mean Cobra. I don't know

[3] Appellant is 5 feet 6 inches tall.

which one shot." Martinez recognized Ayala and Castro, who were with the victim. Martinez tried to grab her friends because she knew the people they had a problem with and knew they were not Norteños.

After the gunshots, everyone from the party ran. Martinez got into a car and they drove away. She went to Danger's house, where she saw Cobra with a gun; she saw the black handle of a pistol in his waistband. After her mother called her, Martinez called Cobra and confronted him. He apologized for getting her involved, but did not admit the shooting. He also told her not to say anything to the police or she would be labeled a snitch.

Martinez said Cobra, Danger, Duende, and Creeper were all Sureño gang members. She identified Cobra's and Danger's photographs.

Appellant was arrested on January 31. From his bedroom, police recovered a baggie containing six live .357 magnum handgun rounds, three pairs of baggy blue jeans, a blue and white striped shirt, two large black hooded sweatshirts, and a jersey with the number 13. From appellant's vehicle, police recovered several photographs of appellant wearing blue, holding various firearms, and making or "throwing a three" with his hand.

Officer Robert Brady testified that he executed a search warrant at Danger's house on January 31. He located gang indicia in the house. They never located Danger, and were still looking for him.

Jorge Sanchez testified that he knew appellant. Sanchez sometimes hung out with Duende, Creeper, and other ML's. Danger was an RST. Castro said RST's shot Mendoza-Lopez. Ingrid Martinez told Sanchez she saw Cobra shoot a Norteño, Mendoza-Lopez. Sanchez was angry and wanted revenge because Mendoza-Lopez was his cousin. Sanchez saw appellant four days after Mendoza-Lopez was killed. Appellant said he was nervous because he had shot a Norteño, but he did not know the Norteño had Sureño family. He said the victim was wearing red. He also said Martinez had talked to the police who were looking for him. Sanchez planned to beat up or kill appellant.

Dr. Ikechi Ogan, who performed the autopsy, testified that Mendoza-Lopez suffered two gunshot entry wounds: one in his right shoulder/chest region, and the other

in his left thigh. One bullet perforated the pericardial sac, aorta, left ventricle of the heart, left lung, diaphragm, and stomach. The other bullet fractured his femur. The shots were fired from a distance of no more than two feet. Mendoza-Lopez had no drugs in his system and a 0.03 percent blood alcohol level. The cause of death was multiple gunshot wounds of the torso and thigh.

The testimony of Lucila Navarro was admitted as relevant to prior uncharged conduct. On May 6, 2007, Navarro was with a group of friends at Keller Beach. A group of six to eight men, most wearing blue, jumped her brother Francisco, screaming "Sur Trece," and trying to hit him. One of them hit Francisco in the head with a bottle, and he fell to the ground unconscious. He was treated at the hospital. Navarro identified appellant as one of the assailants. He was wearing blue and had "SS" and "X3" tattoos on his shoulders. Appellant punched and kicked her brother and then threw a beer bottle at his chest. When Francisco fell to the ground and lost consciousness, appellant repeatedly kicked him in the torso.

When appellant was arrested after the Keller Beach incident, he identified himself as a Mexican Locos and Southside Locos gang member. Deputy Sheriff David Cushman supervised appellant at the jail in Martinez. He described appellant's English as "less than limited;" he could not speak whole sentences in English.

Defense Case

Defense witness Dr. Scott Fraser, an expert in eyewitness identification, testified that people who are certain in their identification are just as likely to be correct or incorrect as those who say they are 50 or 75 percent certain. Thus, confidence is not an accurate predictor of accuracy. When someone experiences a stressful event, blood flow to the brain decreases and less information is processed. When a weapon is present, it increases stress and distracts the attention, reducing the accuracy of correct recognition. Errors in identification can occur as a result of a process known as conscious transference, whereby a person misidentifies an individual as someone he or she has seen before. Dr. Fraser did not interview any of the principals in the case.

On July 23, 2010, the jury convicted appellant of counts 1 through 3 and acquitted him of counts 4 through 7. In connection with count 1, the jury convicted him of second degree murder of Mendoza-Lopez and found true that the crime was committed for the benefit of a criminal street gang and that a principal in the offense used and intentionally discharged a firearm causing the victim's death; it found not true that appellant personally and intentionally discharged the firearm. In connection with count 2, the jury convicted appellant of conspiracy to commit murder and to commit aggravated assault; the verdict form did not require the jury to specify either crime or both as the object[s] of the conspiracy. The jury found true two of the 18 overt acts alleged, both of which related to the killing of Mendoza-Lopez, and found true that the conspiracy was to benefit a criminal street gang. In count 3, the jury found that appellant participated in a criminal street gang.

Because the jury failed to make a finding on the purpose of the conspiracy, the court subsequently designated the verdicts on counts 2 and 3 as convictions of conspiracy to commit aggravated assault. The court found the allegation of appellant's prior conviction true and deemed it a serious felony and a strike prior.

On September 17, 2010, the trial court sentenced appellant to 60 years to life in state prison as follows: 30 years to life on count 1 (15 years to life, doubled under Three Strikes); 25 years to life for the gun discharging allegation; and five years for the prior serious felony. The sentences on counts 2 and 3 were stayed pursuant to section 654.

On September 22, 2010, appellant filed a timely notice of appeal.

III. DISCUSSION

Appellant contends that the trial court violated his due process rights by instructing on invalid theories of second degree felony murder in which the underlying felonies were assault and conspiracy to commit assault in violation of *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*) and *People v. Chun* (2009) 45 Cal.4th 1172 (*Chun*). Further, he argues that the error was prejudicial and requires reversal of his second degree murder conviction.

In *Ireland, supra,* 70 Cal.2d 522, our Supreme Court concluded that assault with a deadly weapon cannot serve as the predicate felony for purposes of the felony murder rule. The court adopted a merger rule that limited the application of second degree felony murder where the underlying felony was "an integral part of the homicide." (*Id.* at p. 539.) The court explained: "To allow . . . use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law." (*Ibid.*)

In *Chun, supra,* 45 Cal.4th at pages 1189, 1200, the court acknowledged that inconsistencies had emerged in its prior holdings based on *Ireland*. The court reconsidered those cases and adopted a simplified test for application of the merger doctrine in a second degree felony murder situation: "When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction. An 'assaultive' felony is one that involves a threat of immediate violent injury. [Citation.] In determining whether a crime merges, the court looks to its elements and not the facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide even if the elements also include conduct that is not assaultive." (*Chun* at p. 1200.)

Here, based on *Ireland* and *Chun,* appellant contends the trial court gave three erroneous instructions to the jury. First, he challenges the court's instruction on second degree felony murder based on aiding and abetting: "If a human being is killed by any one of several persons engaged in the commission of the crime of *assault with force likely to produce great bodily injury and/or assault with a deadly weapon*, felonies inherently dangerous to human life, all persons who either directly and actively commit the act constituting one of those crimes or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging or facilitating the commission of the offense, aid, promote, encourage or instigate by act

or advice its commission are guilty of murder of the second degree, whether the killing is intentional, unintentional or accidental." (CALJIC No. 8.34, emphasis added.)

Second, he challenges the court's instruction defining murder, which included assault with force likely to produce great bodily injury and assault with a deadly weapon as inherently dangerous felonies: "The defendant is accused in Counts 1, 4, 5, 6 and 7 of having committed the crime of murder, a violation of Penal Code Section 187. Every person who unlawfully kills a human being with malice aforethought or during the commission or attempted commission of a felony inherently dangerous to human life is guilty of the crime of murder in violation of Penal Code Section 187. [¶] In order to prove this crime, each of the following elements must be proved: One, a human being was killed; two, the killing was unlawful; three, the killing was done with malice aforethought or occurred during the commission of a felony inherently dangerous to human life which was perpetrated by someone other than the defendant. [¶] *Assault with force likely to produce great bodily injury and assault with a deadly weapon are felonies inherently dangerous to human life*." (CALJIC No. 8.10, emphasis added.)

Third, he challenges the court's instruction regarding second degree felony murder based on conspiracy: "If two or more persons conspired together to commit a felony inherently dangerous to human life, namely, *assault with force likely to produce great bodily injury and assault with a deadly weapon*, and if the life of another person is taken by one or more of them in furtherance of the common design and if that killing is done to further that common purpose *or* is the natural and probable consequence of the pursuit of that purpose, all of the co-conspirators are equally guilty of murder of the second degree, whether the killing is intentional, unintentional or accidental."[4] (CALJIC No. 8.33, emphasis added.)

[4] This instruction erroneously stated that the killing had to be in furtherance of the conspiracy to assault *or* a natural and probable consequence of the common plan or design of the conspiracy, i.e., phrased in the disjunctive. However, both findings are required.

Respondent concedes, based on *Ireland* and *Chun*, that the trial court erred in instructing the jury on felony murder based on assault by means of force likely to produce great bodily injury or assault with a deadly weapon under section 245. However, respondent contends the error was harmless beyond a reasonable doubt based on the facts of this case.

"Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict. [Citations.]" (*Chun*, *supra*, 45 Cal.4th at p. 1201.) *Chun* explained that, where the jury has been instructed with both a legally adequate and a legally inadequate theory, e.g., a valid malice murder theory and an invalid second degree felony murder theory, "to find the error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory, i.e., either express or conscious-disregard-for-life malice." (*Id*. at p. 1203.) Finally, *Chun* stated that the reviewing court can find the instructional error harmless only if "other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice . . . ." (*Id*. at p. 1205.)

The prejudice analysis in *Chun* is instructive. There, the evidence showed that shots were fired from one car, a Honda, into another, a Mitsubishi, when both were stopped at a stoplight. At least six bullets were fired from three different guns. All three occupants in the Mitsubishi were struck by bullets; one person was killed. The defendant admitted to being in the backseat of the Honda; he identified the driver and said there were two others in the car. In a second statement, the defendant admitted to firing a gun during the incident but claimed he did not point the gun at anyone and just wanted to scare the victims. The jury found that the defendant was an active participant in a criminal street gang and that the shooting was committed for the benefit of the gang. (*Chun*, *supra*, 45 Cal.4th at pp. 1179-1180.) The erroneous felony murder instruction given to the jury in *Chun* "required the jury to find that defendant had the *specific intent* to commit the underlying felony of shooting at an occupied vehicle. Later, it instructed

that to find defendant committed that crime, the jury had to find these elements: [¶] '1. A person discharged a firearm at an occupied motor vehicle; and [¶] 2. The discharge of the firearm was willful and malicious.' " (*Id.* at p. 1205.)

Based on the facts and the jury instructions, the court found that the invalid felony murder instruction was harmless. It explained: "[A]ny juror who relied on the felony-murder rule necessarily found that defendant willfully shot at an occupied vehicle. The undisputed evidence showed that the vehicle shot at was occupied by not one but three persons. The three were hit by multiple gunshots fired at close range from three different firearms. No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life—which is a valid theory of malice. In other words, on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice. The error in instructing the jury on felony murder was, by itself, harmless beyond a reasonable doubt." (*Chun*, *supra*, 45 Cal.4th at p. 1205.)

Here, the jury found "not true" the allegation that appellant personally and intentionally discharged the firearm, and rejected the seventh overt act alleged in the conspiracy count, i.e., that appellant was the shooter. The evidence showed that there was one gun used by one shooter. Thus, appellant's second degree murder conviction was based on aiding and abetting or being a co-conspirator, and not on his being the perpetrator of the fatal shooting. The only overt acts found by the jury were that appellant was at the upstairs party with other Sureños and that he told the others that someone downstairs was wearing red. There was no evidence that appellant or anyone else knew that Garcia had a gun that night or that he habitually carried a firearm, and no evidence that anyone at the upstairs party said anything about shooting or killing the individual who was downstairs wearing red. Ingrid Martinez testified that the most she was expecting was a fist fight.

As in *Chun*, the court here instructed on both implied malice murder and felony murder. (*Chun*, *supra*, 45 Cal.4th at pp. 1202-1203.) However, unlike the felony murder

instruction in *Chun*, here the court's instruction did not require proof that appellant had the specific intent to commit or aid in committing the crime of shooting into an occupied vehicle. Rather, all it required was proof that appellant committed or aided in committing the crime of assault by means of force likely to produce great bodily injury and/or assault with a deadly weapon. The court's instruction on the elements of those crimes required proof that (1) "a person was assaulted;" and (2) "the assault was by means of force likely to produce great bodily injury or with a firearm." There was no requirement, as in *Chun*, that to find appellant guilty of second degree felony murder, the jury had to find that he acted with the knowledge and intent that a willful and malicious shooting at close range would take place, a finding that necessarily included a conscious disregard for life. (*Chun*, *supra*, 45 Cal.4th at p. 1205.) By contrast, here the jury could have applied the invalid felony murder instruction to convict appellant of second degree murder based on finding that he intended to aid in an aggravated assault, with no subjective belief that it would endanger someone's life.

Respondent contends that the instructional error here was harmless beyond a reasonable doubt under the reasoning of *Chun* and *People v. Hach* (2009) 176 Cal.App.4th 1450 (*Hach*), which followed *Chun*. In *Hach*, the defendant fired a rifle into a car occupied by two people from a distance of ten feet, killing the passenger. (176 Cal.App.4th at p. 1454.) The trial court instructed the jury on alternate theories of second degree murder, both malice aforethought and felony murder based on the predicate felony of shooting at an occupied vehicle. The appellate court found the felony murder instruction was invalid but, as in *Chun*, the error was harmless beyond a reasonable doubt. (*Id*. at p. 1453.) The court explained that, to find the defendant guilty of second degree felony murder, the jury must have found that he willfully shot at an occupied vehicle. In fact, the jury made this finding when it convicted him of violating section 246. The defendant fired directly into the car from 10 feet away, knowing there were two people inside. "As in *Chun*, the jury must have found defendant committed an act that is dangerous to life, knew of the danger, and acted with conscious disregard for life. In other words, the jury found defendant acted with implied malice. Accordingly, as in

Chun, the error in instructing on second degree felony murder was harmless beyond a reasonable doubt." (*Id*. at p. 1457.)

Respondent contends that this analysis is applicable to appellant's case, but the argument does not withstand scrutiny. In *Chun* and *Hach*, the underlying felony was shooting into an occupied vehicle; the evidence in both cases showed the defendants knew the cars were occupied and fired their weapons at short distances into the cars, knowing that doing so would put the occupants in danger. Here, the underlying felony is aggravated assault. The evidence at trial and the jury's verdicts showed that the shooter, presumably Garcia (Danger), suddenly pulled a gun from concealment, but there was no evidence that anyone knew he had a gun or intended to shoot anyone.

Respondent argues that "the jury must have found that appellant or Garcia, in shooting Lopez at close range with a .357 magnum revolver, 'committed an act that is dangerous to life, knew of the danger, and acted with conscious disregard for life.' (See *People v. Hach*, *supra*, 176 Cal.App.4th at p. 1456.)" Respondent continues: "In light of the record in this case, these findings support the conclusion that the jury necessarily found that appellant harbored, at a minimum, implied malice." We disagree. First, the jury found not true that appellant was the shooter. Second, based on this determination and the instructions given, the jury was free to convict appellant of second degree murder on any evidence that appellant did something to aid Garcia's commission of aggravated assault, with knowledge of Garcia's unlawful purpose to commit assault, and with the intent to aid that crime even if he did not act with conscious disregard for life.

Next, respondent argues that the inference of malice necessarily follows from the commission of aggravated assault where the jury, to convict appellant of second degree felony murder, necessarily found that the aggravated assault was a felony inherently dangerous to human life. Respondent relies on Justice Baxter's dissent in *Chun* on this point, but we are bound to follow the majority opinion in that case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, the jury was *instructed*—it did not *find*—that the assault was a felony inherently dangerous to human life.

Anticipating an objection from appellant that imputing malice when a homicide occurs during the perpetration of a felony that is inherently dangerous to human life would effectively elevate all assaultive crimes into murder, in the absence of legal justification or defense, respondent does not disagree but offers that, in this case, its position results in no injustice. Respondent explains: "Under second degree felony murder, the defendant's mental state is not available to mitigate the murder to manslaughter. Thus, evidence of imperfect self defense or heat of passion would be unavailable to the defendant. However, on the facts of this case, there was no evidence to support mitigation of murder. Nor did the defense attempt to argue mitigation. Thus, our position does not deprive appellant of a viable defense available in non-felony-murder situations." We disagree. Respondent entirely overlooks the fact that the felony murder instructions precluded appellant from defending against second degree murder on grounds that the evidence failed to show, beyond a reasonable doubt, that appellant acted with conscious-disregard-for-life malice. Under the felony murder instructions provided by the court, the jury was authorized to convict appellant of second degree murder without regard to the presence or absence of malice.

Finally, respondent contends that, "independent of the second degree felony murder rule, appellant was properly convicted under the natural and probable consequences doctrine." This argument we find persuasive.

"The natural and probable consequences doctrine provides that: ' "[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets . . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must

be found by the jury." [Citation.] Thus, . . . a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the "natural and probable consequence" of the target crime.' [Citation.]

"Aider and abettor culpability under the natural and probable consequences doctrine for a nontarget, or unintended, offense committed in the course of committing a target offense has a different theoretical underpinning than aiding and abetting a target crime. Aider and abettor culpability for the target offense is based upon the intent of the aider and abettor to assist the direct perpetrator to commit the target offense. By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. (*People v. Garrison* (1989) 47 Cal.3d 746, 778 [accomplice liability is vicarious].) Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime. It follows that the aider and abettor will always be 'equally guilty' with the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime." (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 851-852.)

According to respondent, because the intended crime was not simple assault, but rather was aggravated assault—assault with force likely to produce great bodily injury or assault with a deadly weapon—the jury necessarily would have found that Mendoza-Lopez's murder was a natural and probable consequence of the assault. Based on the evidence and the jury's verdicts, a principal, i.e., Garcia, intentionally discharged a firearm, killing Mendoza-Lopez, with no mitigating circumstances. Although appellant was not the shooter, he was found guilty of second degree murder and conspiracy to

commit aggravated assault. The target offense was aggravated assault, and the jury necessarily found that appellant intended to commit the target offense.

Our Supreme Court has addressed the dangerousness of gang-related conflicts. (*People v. Medina* (2009) 46 Cal.4th 913 (*Medina*).) An act is dangerous to life for the purposes of malice where there is a high probability that it will result in death. (See *People v. Patterson* (1989) 49 Cal.3d 615, 626-627.) *Medina* involved a gang fist fight, after which one of the co-defendants shot and killed the rival gang member. (*Medina, supra,* 46 Cal.4th at p. 917.) The gunman and his co-defendants were convicted of murder. The court stated that " ' "a natural and probable consequence is a foreseeable consequence." . . . .' " (*Id.* at p. 920.) Liability under the natural and probable consequences doctrine attaches if " 'a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' " (*Ibid.*)

In *Medina*, the court also discussed the foreseeability of firearm use by gang members: "[P]rior knowledge that a fellow gang member is armed is not necessary to support a defendant's murder conviction as an aider and abettor. (*People v. Montes* [(1999)] 74 Cal.App.4th [1050,] 1056 ['[g]iven the great potential for escalating violence during gang confrontations, it is immaterial whether [defendant] specifically knew [fellow gang member] had a gun']; *People v. Godinez* [(1992)] 2 Cal.App.4th [492,] 501, fn. 5 ['although evidence indicating whether the defendant did or did not know a weapon was present provides grist for argument to the jury on the issue of foreseeability of a homicide, it is not a necessary prerequisite']; *People v. Montano* [(1979)] 96 Cal.App.3d 221, 227, [defendant's liability for aiding and abetting attempted murder not dependent on awareness that fellow gang members possessed deadly weapons].) Likewise, prior gang rivalry, while reflecting motive, is not necessary for a court to uphold a gang member's murder conviction under an aiding and abetting theory. (See *People v. Olguin* [(1994)] 31 Cal.App.4th 1355, 1382-1383.)" (*Medina, supra,* 46 Cal.4th at p. 921.)

Here, where the jury found appellant guilty under an aiding and abetting theory, he was properly found guilty of murder under the natural and probable consequences

doctrine because of the heightened potential for gun violence with gangs and because of the foreseeability of someone being killed. (See *Medina, supra,* 46 Cal.4th at p. 921.) The evidence showed that appellant and Garcia approached the victim followed by several others, rushed downstairs and confronted him about wearing red clothing. The shooter fired several times at close range with two of the bullets striking the victim and killing him. There was no evidence of any mitigating circumstance such as any form of self-defense or heat of passion. At a minimum, the shooter evinced implied malice, and appellant was held vicariously liable for the foreseeable consequence of the violent assault. (See *Medina, supra,* 46 Cal.4th at p. 920; *People v. Canizalez, supra,* 197 Cal.App.4th at pp. 851-852.)

IV. DISPOSITION

The judgment is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.